In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 13, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF TEXAS

MEMORANDUM IN REGARD TO THE STATE'S OBJECTIONS TO THE DECREE PROPOSED BY THE UNITED STATES

This memorandum is in response to the State's objections to the decree proposed by the United States and to the memorandum filed in support of those objections.

I

There is plainly no merit to Texas' claim that an injunction should not issue until there has been a further particularization or elaboration of the area described in paragraph 1 of the proposed decree (Objections, pp. 1, 3–6). The proposed injunctive paragraph deals solely with oil, gas, and mineral operations seaward of the low-water mark and outside of inland waters; and it is not,

and cannot be controverted that at the present time all offshore oil, gas, and mineral operations—including in the term "operations" all existing oil and gas wells (whether or not now producing), and also whatever drilling operations, maintenance of equipment, or other development there may now be—are plainly identifiable as indisputably on one side of the boundary or the other. The Texas coast is relatively straight and there is no room for disagreement as to any of the offshore points at which such operations are now being carried on. The State's main brief itself shows that the only wells producing oil at the time of the argument in March 1950, which would be affected by the injunction, are clearly bottomed in the subsoil of the marginal sea and are seaward of the ordinary low-water mark. See Texas' Main Brief, p. 12, and the "Diagramatic Cross Section of Caplen Field, Texas", opposite p. 12. All of the other existing offshore oil and gas wells (not now producing) and the other developmental activities, which could conceivably be affected by the injunction, are even more clearly seaward of the boundary. Texas' Objections do not dispute this fact or suggest the contrary.[1]

The real burden of the State's argument is that unspecified *future* operations under present or

[1] In the *California* case, on the other hand, there was an active and *bona fide* dispute between the State and the United States as to the status of every well or operation claimed by the United States to be seaward of the boundary set forth in paragraph 1 of the Court's decree in that case.

future state leases *might* involve areas which are not so clearly defined as the areas involved in present operations, and that, therefore, no injunction should now issue, even as to the clearly defined and indisputable areas of present operation, until the Court has delineated and marked the boundary all along the coast. The conclusive answer is that if such future operations do eventuate, and a real problem of demarcation or identification does arise—an event which the configuration of the Texas coast makes unlikely [2]—the State or the United States or the Court *sua sponte* can then initiate supplementary proceedings for a more detailed demarcation of the boundary at the particular spot, and, if there be need, the injunction can meanwhile be modified, augmented, or suspended. Present injunctive relief to which the United States is entitled should not be denied because of the hazard that future circumstances may possibly call for change in the terms or specificity of the injunction.

[2] There also is little likelihood of any dispute over the meaning of "ordinary low-water mark." Like the related concept of ordinary high-water mark, the ordinary low-water mark is not a "physical mark made on the ground by the waters," but is the line of ordinary low water "as determined by the course of the tides." Cf. *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22. The ascertainment of the ordinary low-water mark, or the point at which the plane of ordinary low water intersects the shore, is an engineering process which can be performed, where necessary, by the Coast and Geodetic Survey or some similarly qualified organization. See Marmer, H. A., *Tidal Datum Planes* (U. S. C. & G. S., Special Publication No. 135, 1927), pp. 97, *et seq.*

In this connection, it may help to remove a possible misunderstanding of the position of the United States on the boundary to point out explicitly that we agree with Texas (Objections, p. 4) that the "low-water mark for measuring the marginal sea" is on the seaward side of the line of coastal islands, consisting, in greatest part, of Padre Island, Mustang Island, St. Joseph Island, Matagorda Island, Matagorda Peninsula, Galveston Island, and Bolivar Peninsula. There is no controversy on that point.

II

The United States has no intention of stopping the production of oil from existing wells, and the proposed injunction would not have that effect (Texas' Objections, pp. 1, 6, 10–13).[3] The proposed paragraph 2 enjoins oil and gas operations only if authorization is not first obtained from the United States, and the Secretary of the Interior stands ready, on behalf of the United

[3] With respect to the State's emphasis on the supposed harm which will allegedly follow upon an injunction, it is pertinent to recall that in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237–9, the Court pointed out that in a suit such as this by a sovereign or quasi-sovereign the "court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power," and added that "Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine."

States, to authorize continued production from existing wells on proper terms and conditions.[4]

Though Texas denies authority in the Federal Government to take such steps without further legislation, it is difficult to see what right the State has to raise that issue in the face of the Federal Government's assertion, which we now reiterate,[5] that it has such authority and is prepared to exercise it. The Secretary of the Interior has full power to make interim arrangements to protect and preserve the lands and resources adjudged to the United States from injury, deterioration, seepage, drainage, or other harm.[6] This power includes authority to permit continued production, on appropriate terms, from existing wells. Cf. Executive Order No. 9633, 3 C. F. R., 1945 Supp., p. 123; 5 U. S. C. 485 (12); 40 Op. Atty. Gen. 41. If the United States asserts its willingness to make such arrangements, as it does, the State of Texas can-

[4] We are informed that at the present time there is no production of oil or gas from wells which would be affected by the injunction.

[5] See statement of Attorney General Tom C. Clark before Joint Hearings of the Committee on the Judiciary, considering S. 1988 and similar House bills, 80th Congress, Second Session, March 2–3, 1948, pp. 612, 679, and also statement of Mastin White, Solicitor of the Department of the Interior, at the Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 195, 81st Congress, Second Session, August 14–19, 1950, at p. 31.

[6] The State itself points out the loss and detriment which would follow upon stoppage of existing production (Objections, p. 12).

have no standing or interest, in the present suit, to deny its power to do so.

III

The fact that the lessees are not parties to this suit (Objections, pp. 1, 6–10) does not bar their being named in the injunctive paragraph of the decree. This is not a conventional real property action between private claimants, but a controversy between the United States and one of its constituent States over the boundary between their respective spheres. For over a century it has been settled that in original suits of this type between sovereigns or quasi-sovereigns—as in the comparable case of a suit over water rights in interstate streams—the parties represent their citizens, grantees, and those who claim under them, and the latter are bound by the decree, and their private rights are necessarily determined and affected by this Court's decision, whether or not they have been parties.[1] *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 106–108; *Poole* v. *Fleeger*, 11 Pet. 185, 209; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 725, 748; *Wyoming* v. *Colorado*, 286 U. S. 494, 508–9; *Nebraska* v. *Wyoming*, 325 U. S. 589, 627; see also *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355–6; *Georgia* v. *Tennessee Copper Co.*,

[1] No lessee has sought to intervene or become a party to the suit.

206 U. S. 230, 237, and the other cases cited in *Wyoming* v. *Colorado, supra,* p. 509, fn. 5.

A notable example of a suit between sovereign litigants in which the rights of persons not parties to the proceeding were foreclosed by the decree is the case of *Louisiana* v. *Mississippi,* 202 U. S. 1. That suit involved a dispute over the location of the boundary between the States where it traverses the inland waters of Lake Borgne and the Mississippi Sound, but the controversy was precipitated by the efforts of the respective States to regulate and issue permits for the dredging of oysters from submerged lands in the disputed area. In the decree entered in that case, this Court adjudged the boundary to be that determined in its opinion and included in its decree the following injunctive relief (202 U. S. 58–59):

> It is further ordered, adjudged and decreed that the State of Mississippi, its officers, agents and *citizens,* be and they are hereby enjoined and restrained from disputing the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map. [Emphasis supplied.]

Another instance of injunctive relief of this character is to be found in the case of *Wisconsin* v. *Illinois,* the celebrated interstate controversy involving the operation of the Chicago Drainage Canal. In the decree entered in that case on

April 21, 1930, 281 U. S. 696, there appears the following:

> * * * the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and *all persons assuming to act under the authority of either of them,* be and they hereby are enjoined from diverting any of the waters of the Great Lakes-St. Lawrence system or watershed through the Chicago Drainage Canal and its auxiliary channels * * *. [Emphasis supplied.]

And in *New Jersey* v. *Delaware,* 291 U. S. 361, a boundary proceeding, the decree entered by the Court contains the following (295 U. S. 694, 698–699):

> The State of Delaware, its officers, agents and representatives, *its citizens and all other persons,* are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree; and the State of New Jersey, its officers, agents and representatives, *its citizens and all other persons* are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree. [Emphasis supplied.]

It is clear from these cases that injunctive relief may be granted in suits between sovereigns

and may be made effective against persons deriving the rights from one of the sovereign litigants, even when those persons are not joined as parties to the litigation. On principle, the result should be the same. Since the lessees have been represented by the State, are bound by the declaration of rights to be entered, and their rights in the designated area are conclusively determined, there is no reason why the injunction should not run against them. Even in private equity cases, an injunction may properly be issued against persons represented by the defendant (*Scott* v. *Donald*, 165 U. S. 107, 117) and those who are its associates or confederates in performing the prohibited acts (*Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436–7). The oil companies which are the State's lessees fall within both of these classes.

Moreover, in original suits of this character between sovereigns, in which multiplication of parties is highly undesirable and the public nature of the controversy is dominant, there is a special reason for departing from the rules as to persons against whom relief may be granted which may be thought to govern in private controversies. Adequate relief to the prevailing sovereign should not be refused because it is necessary to cover persons through whom the defending sovereign acts and whose interests it purports to serve, but who have properly not been made parties. In thus allowing the public nature of the controversy to control the relief, there is little likelihood that

the lessees will be harmed because they have not been made parties. Their general interests in the disputed area have been, and are being, represented by the State. It is very doubtful whether there exist any unique or peculiar circumstances tending to show that relief should not be granted against a particular lessee, but, if there be such substantial reasons, the individual case can be dealt with administratively under the Federal Government's power to authorize operations seaward of the boundary, or, perhaps, by special judicial petition or proceeding.

IV

A. As pointed out in our Memorandum in Support of the Proposed Decree (pp. 3–4, 7), the date June 23, 1947, appears in the complaint's prayer for relief with reference to the prayed-for accounting—the prayer for relief which the Court has adjudged should be granted—and was chosen because the Court's *California* opinion gave adequate warning of the rights and powers of the United States in the submerged coastal lands off Texas, as well as off the other States. This Court's opinion of June 5, 1950 (339 U. S. 707) is largely grounded in the *California* opinion, and there is no inequity in requiring the State to account for moneys received since the date of the earlier decision.[8]

[8] Texas makes much of the fact that the United States "waited a year and a half after the *California* decision to bring suit against Texas" (Objections, pp. 17–18), as indi-

As for the State's alternative argument—that "if the date from which the accounting is to begin is not the date of the Court's opinion in this case, in no event should it be prior to May 16, 1949, the date of the filing of the complaint herein" (Objections, pp. 19-23)—it seems enough, for present purposes, to point out that the United States actually filed its motion for leave to file the complaint on December 21, 1948, and that May 16, 1949, is the date of this Court's order granting that motion (337 U. S. 902), after several months of delay due to the State's strenuous opposition to the filing of the complaint.

B. We do not agree that the addition to paragraph 3 proposed by the State at p. 24 of its Objections is necessary or desirable. Paragraph 4 of the proposed decree affords full authority for the Court to take such action as it deems proper should the parties fail to agree upon the accounting within a reasonable time. See the United States' Memorandum in Support of the Proposed Decree, pp. 7, 8. In our view, it would be undesirable to set a definite time limit, or to anticipate the mechanism for resolving disputed issues which may arise under the accounting

---

cating the extent of the Federal Government's uncertainty about the application of the California decision to Texas' special case, but it fails to note that the suit against Louisiana—admittedly not a special case—was begun on the same day, December 21, 1948.

paragraph of the decree; the nature and scope of those disputed issues cannot now be known.

CONCLUSION

The objections made by the State to the proposed decree are not sound in any respect.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950